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IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA.

Criminal Appeal No.D-23 of 2017
Criminal Appeal No.D-24 of 2017

Present:

Mr. Justice Muhammad Iqbal Kalhoro,
Mr. Justice Irshad Ali Shah,

Appellants : Mst. Shah Bibi alias Moomal in Appeal No.23/2017 and Muhammad Waris and Mst. Shah Baiji alias Moomal in Appeal No.24/2017, through Mr. Ahmed Bux Abro, Advocate.

Respondent: The State through Mr. Khadim Hussain Khooharo, Additional Prosecutor General.

Date of Hearing : 12.03.2018.

Date of Judgment : 12.03.2018.

J U D G M E N T.

MUHAMMAD IQBAL KALHORO, J.- This judgment shall dispose of the captioned two appeals filed by appellants against one and same judgment dated 15.3.2017 passed by Sessions Judge/Special Judge, (CNSA), Jacobabad in CNS Case No.32/2015, Crime No.113/2015 registered at Police Station Saddar Jacobabad under section 9(c) of Control of Narcotic Substances Act, 1997, whereby they were convicted and sentenced to undergo life imprisonment with fine of Rs.100,000/- each, in default whereof to undergo R.I for six months more. Benefit of Section 382-B, Cr.P.C was, however, extended to them.

2. Brief facts of the case are that the appellants on a spy information were arrested from a road near Shambay Shah, taluka and district Jacobabad on 11.11.2015, at 1300 hours while riding a motorcycle No.nil, along with a "Bachka" containing 25 packets, each weighing one kilogram of charas and each packet was having two slabs weighing ½ kg each. Thus in all 25 kilograms of charas was recovered from the appellants. From each packet, one slab weighing 500 grams was separated and sealed for the purpose of examination by the chemical analyzer. The remaining 12.5 kilograms of charas was separately sealed. Such memo of arrest and recovery was prepared at

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the spot and subsequently the appellants were brought at police station, where instant FIR was registered against them.

3. After usual investigation the challan against the appellants was submitted, which followed framing of a formal charge against them, they pleaded 'not guilty' and claimed trial.

4. The prosecution in order to prove its case has examined PW-1/complainant SHO Ayaz Ahmed Pathan at Ex.8, who has produced DD entries, memo of arrest and recovery, FIR and chemical examiner's report; PW-2/mashir ASI Ashique Ali at Ex.9; PW-3/PC Muhabat at Ex.13, who has produced DD entry and copy of road certificate; and PW-4/PC Badal at Ex.15. After closure of prosecution evidence, statements of appellants under section 342. Cr.P.C were recorded, in which they have denied the prosecution case and have professed their innocence. However, they did not examine themselves on oath nor led any evidence in their defence. Finally the trial Court after hearing the parties has convicted the appellants vide impugned judgment in the terms as stated in para No.1.

5. Mr. Ahmed Bux Abro, learned Counsel for appellants in both appeals after arguing at some length has submitted that the sentence awarded to the appellants is not justified, as the record reflects that 25 packets were recovered and in each packet there were two separate slabs, each weighing 500 grams and, therefore, in all there were 50 slabs allegedly recovered from the appellants, but out of them only 25 slabs weighing 12.5 kilograms were separated and sent to the office of Chemical Analyzer. From the remaining 25 slabs i.e. 12.5 kilograms, no representative sample was taken, therefore, the said recovery cannot be read or considered against the appellants in view of judgment of Hon'ble Supreme Court in the case of *Ameer Zaib v. The State* (PLD 2012 SC 380). He has further stated that only 12.5 kilograms of charas could be considered against the appellants and if it is divided between the two appellants, each appellant would be liable for having 6.25 kilograms charas in his/her possession and in view of the dictum laid down in the case of *Ghulam Murtaza v. The State* (PLD 2009 Lahore 362) approved by the Hon'ble Supreme Court in *Ameer Zeb's* case (supra), the appellants would be convicted and sentenced for 9 years and 6 months and fine of Rs.45000/- each. He has further submitted that although there are contradictions in the evidence of prosecution witnesses, but if in view of above facts and circumstances, the sentence of the appellants is reduced to the above said period, he would not press the appeal.


6. Mr. Khadim Hussain Khooharo, learned Additional Prosecutor General, has not been able to controvert the above contentions of learned defence Counsel and has conceded to the reduction of the sentence.

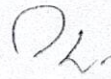
7. We have considered submissions of the parties and have perused the material available on record. The prosecution has examined in all 04 witnesses to support its case. A perusal of their evidence reflects that they have supported each other on all material aspects of the case and despite being subjected to a lengthy cross-examination no material contradiction qua salient features of the case has come on record. The arrest of the appellants with the motorcycle from the place of incident viz. road near Shambay Shah, taluka & district Jacobabad on the relevant day does not appear to be doubtful. However, at the same time, it must be mentioned that it is alleged that from the appellants a "Bachka" with 25 packets of charas, each weighing one kilogram, was recovered. In each packet, there were two separate slabs of charas, each weighing 500 grams, and thus in all 50 slabs in 25 packets were recovered from the "Bachka". Out of them only 25 slabs weighing 12.5 kilograms were separated and sent to the office of Chemical Examiner. From remaining 25 slabs no representative sample for examination by the Chemical Examiner was taken. Admittedly, therefore, there is no expert opinion regarding the remaining 25 slabs being narcotics. As per decision of the Hon'ble Supreme Court in *Ameer Zeb's* case (supra), the investigating officer was required to take a representative sample from each slab and in absence thereof, the remaining substance cannot be held to be narcotics and used against the accused. That being the position, the appellants would be held responsible for the recovery of 12.5 kilograms of charas, and if this quantity of charas i.e. 12.5 kilograms is divided between the two appellants, each appellant would be held liable for possessing 6.25 kilograms of charas. As per the sentencing policy stipulated in *Ghulam Murtaza's* case (supra) and endorsed by the Hon'ble Supreme Court in *Ameer Zeb's* case (supra), the conviction and sentence for possessing charas between 6-7 kilograms is 9 years and 6 months, with fine of Rs.45000/-. Learned Counsel for the appellants has not disputed the merits of the case and has only requested for reduction of sentence in view of the quantity of charas sent to Chemical Examiner for analysis, for which positive report has been received. Learned Additional Prosecutor General has not objected to it and we after taking guidance from *Ameer Zeb's* case (supra) are of the view that the appellants cannot be held responsible for the 25 remaining slabs weighing 12.5 kilograms, for which no expert opinion holding the same to be narcotics is available. This conclusion would lead to an inference that the appellants would be held responsible for possessing 12.5 kilograms of charas only. If the said

quantity of charas is divided between the two appellants, each appellant can safely be held responsible for possessing 6.25 kilograms of charas at the time of his/her arrest.

8. Accordingly, in view of above, the two appeals in hand are dismissed on merits and the conviction is maintained. However, the sentence awarded to the appellants is modified and reduced from life imprisonment to 9 years and 6 months, with fine of Rs.45000/- each, in default of which to undergo S.I. for 7 months more. The benefit of section 382-B, Cr.P.C is also extended to the appellants.

9. The appeals in above terms stand disposed of


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